Cur. Adv. Vult.

Rose C.J.: This is an appeal against an acquittal. The first respondent is a revenue officer and the suggested defence is that this is a case which falls within section 48 of the Dangerous Drugs Ordinance (Chapter 137). It is clear from section 36 of the Ordinance that the burden of proving that exception rests upon the defence. Having studied the grounds of decision given by the learned District Judge I am unable to conclude that he has come to a positive finding of fact that the exception has been established. Rather he would have appeared to have formed the view that the case is one of doubt and that that doubt should be resolved in favour of the respondents. With all respect to the learned District Judge I consider that that is not a correct view of the matter. It seems to me that if at the end of the prosecution case there were not sufficient facts to establish affirmatively that the exception under section 48 had been established, then the proper course was for the defendants to be called upon for their defence. As the matter will have to be investigated further, I do not wish to comment upon the value of the evidence in the case. The appeal must be allowed and the matter remitted to the learned District Judge to enable him to consider the defence, and determine the case according to law.

Appeal allowed.

Solicitors: *C. J. Koh & Co.*

PRACTICE DIRECTION

[J.C. March 17, 1959]

Privy Council — Costs — Refresher fees to counsel.

The following direction is issued by the Privy Council Office:

The Registrar of the Judicial Committee of the Privy Council begs to notify parties in appeals to Her Majesty in Council that the practice of allowing upon taxation of costs only 10 guineas a day as refresher fees to both senior and junior counsel is to be discontinued. On taxation of costs of appeals set down for hearing after May 8, 1959, the registrar may in his discretion allow refresher fees to counsel in excess of 10 guineas. On refreshers which are allowed the junior counsel will have the usual two-thirds of the senior's fee.

Registrar.

ABIRAMI AMMAL & ANOR. v. M.S.M.M. MEYAPPA CHETTIAR

[C.A. (Thomson C.J., Rigby & Hepworth JJ.) January 22, 1958]

[Ipoh — F.M. Civil Appeal No. 11 of 1958]

Moneylender — Non-compliance with an express provision of the Ordinance — Unenforceable transaction — Security by way of charge — Borrower entitled to relief by way of return of documents of title and entry of a memorandum of discharge on the land register — Moneylenders Ordinance, 1951, s.16.

Land Code — Security executed in form of charge in the form prescribed by Schedule XXIV (a) of the Land Code — Whether particulars contained in the charge sufficient to satisfy the requirements of s.16(3) of the Moneylenders Ordinance.

In this case on July 2, 1953 one C.P. borrowed $3,000 from one V.C., a moneylender, and the same day by way of security he executed a charge in the form prescribed by Schedule XXIV(a) of the Land Code. An authenticated copy of the charge was handed to C.P. before the money was delivered to him and the charge was duly registered. On January 14, 1954, C.P. transferred the land which was still subject of the charge to Sockalingam Mudaliar, a moneylender. On July 22, 1955, Sockalingam Mudaliar died and the present appellants are the executors of his will. On March 16, 1954 V.C. transferred the charge to the present respondent, who is also a moneylender, and on April 7, 1954, the respondent served on Sockalingam Mudaliar a notice under section 138 of the Land Code requiring payment of the principal sum and interest. This notice was not complied with and on January 11, 1957, the respondent commenced the present proceedings against Sockalingam Mudaliar's executors.

The executors (the present appellants) resisted the respondents claim on the ground that the charge was security given by the borrower in respect of a contract for the payment of money lent to him by the moneylender, that no note or memorandum of the contract had been signed and delivered in accordance with section 16(1) of the Moneylenders Ordinance and that it was therefore not enforceable by the reason of the provisions of that section. They went on to ask for an order that the respondent return to them the documents of title relating to the land which had been handed to the chargee when the land was charged and an order against the respondent to discharge the charge or otherwise have it removed from the land register.

The learned trial Judge took the view that the charge itself contained all the particulars required by section 16(3) of the Ordinance and it thus itself constituted a note or memorandum of the contract. He accordingly held that section 16(1) of the Ordinance had been complied with and as there was no question of the fact of the loan or of the authenticity of the charge or

of the devolutions of title on each side he gave judgment for the applicant, the present respondent, as prayed.

Against that decision the executors appealed.

Held: (1) section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd.* v. *Spero* (1)). Nevertheless the Ordinance treats the contract and the security in respect of it as separate and distinct things. There may be a contract without security; there may be a contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security;

(2) the charge is unenforceable;

(3) the appellants should have the relief they asked for by way of return of the documents of title and entry of a memorandum of discharge on the land register.

Cases referred to:—

(1) *Reading Trust Ltd. v. Spero* [1930] 1 K.B. 492.

(2) *Bennett v. Smith*, 47 T.L.R. 592.

(3) *Kasumu v. Baba-Egbe*, [1956] A.C. 539, 551.

(4) *AR. VR. Palanisamy Servai v. S. V. Lingham*, [1954] M.L.J. 145.

COURT OF APPEAL.

R. D. Hume for the appellants.

S. K. Das (*R. G. Suppiah* with him) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appeal raises a question of some importance as to the effect of the Moneylenders Ordinance, 1951.

The facts are not in dispute.

On 2nd July, 1953, one C.P. borrowed $3,500 from V.C., a licensed moneylender, and the same day by way of security he executed a charge in the form prescribed by Schedule XXIV(a) of the Land Code over two pieces of land of which he was the registered proprietor and deposited with the chargee the documents of title. An authenticated copy of the charge was handed to C.P. before the money was delivered to him and the charge was duly registered.

On 14th January, 1954, C.P. transferred the land which was still subject to the charge to Sockalingam Mudaliar, a moneylender who was for many years a familiar figure in the Courts, and on 22nd July, 1955, Sockalingam Mudaliar died leaving his name to adorn the local Law Reports and a Will of which the present appellants are the executors.

On 16th March, 1954, V.C. transferred the charge to the present respondent, who is also a moneylender, and on 7th April, 1954, the respondent served on Sockalingam Mudaliar a notice under section 138 of the Land Code requiring payment of the principal sum and interest.

This notice was not complied with and on 11th January, 1957, the respondent commenced the present proceedings against Sockalingam Mudaliar's executors by way of Originating Summons claiming foreclosure and sale under the charge in satisfaction of the original debt.

The executors (the present appellants) resisted the respondent's claim on the ground that the charge was a security given by a borrower in respect of a contract for the repayment of money lent to him by a moneylender, that no note or memorandum of the contract had been signed and delivered in accordance with section 16(1) of the Moneylenders Ordinance and that it was therefore not enforceable by reason of the provisions of that section. They went on to ask for an order that the respondent return to them the documents of title relating to the land which had been handed to the chargee when the land was charged and an order against the respondent to discharge or otherwise have it removed from the land register.

The learned trial Judge took the view that the charge itself contained all the particulars required by section 16(3) of the Ordinance and it thus itself constituted a note or memorandum of the contract. He accordingly held that section 16(1) of the Ordinance had been complied with and as there was no question of the fact of the loan or of the authenticity of the charge or of the devolutions of title on each side he gave judgment for the applicant, the present respondent, as prayed.

Against that decision the executors have now appealed

The Moneylenders Ordinance, 1951, was intended to regulate the way in which moneylenders carry on their business and one of the ways in which it does this is by providing that before they lend money to a borrower they shall give him a memorandum of the terms upon which the money is lent. Section 16(1) enforces this by saying that:—

"No contract for the repayment by a borrower..... of money lent to him.....by a moneylender.....and no security given by the borrower.....in respect of any such contract, shall be enforceable unless a note or memoran-

dum in writing of the contract.....be signed by the parties to the contract.....and unless a copy thereof authenticated by the lender.....be delivered to the borrower.....before the money is lent, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given, as the case may be."

Section 16(3) provides that the note or memorandum "aforesaid," that is to say required by sub-section (1), shall contain all the terms of the contract and in particular shall show "separately and distinctly" (a) the date of the loan, (b) the principal, and (c) the rate of interest. Section 16(4) provides that where a promissory note given in respect of a loan contains all the terms of the contract and is countersigned by the lender such promissory note shall in itself be a sufficient note or memorandum of the contract for the purposes of the section.

Section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd. v. Spero* [1]). Nevertheless the Ordinance treats the contract and the security in respect of it as separate and distinct things. There may be a contract without security; there may be a contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security.

It is true that in the case of the most usual type of security, that is a promissory note, section 16(4) applies under certain conditions. Section 16(4) provides that under certain conditions the promissory note itself may constitute the note or memorandum, but that sub-section only relates to the form of the note or memorandum where a particular type of security is given and in no way derogates from the necessity for a note or memorandum in every case without exception.

In the present case the security which was presumably required and certainly given was a charge on land in accordance with the Land Code. Apart from this charge nothing was reduced to writing and the question therefore is whether the charge itself can be regarded as the note or memorandum of the contract within the meaning of the section.

I do not think it is necessary to discuss here the question of whether a charge of land can ever be regarded as a contract or whether the consequences which may flow from the execution of such a charge can ever be regarded as contractual nor do I think it necessary to consider the question whether in the case of a moneylender's loan the security and the memorandum must always be separate except where the security consists of a promissory note.

To my mind the present case can be decided on very much narrower ground.

From the wording of section 16 it is clear that no note or memorandum fulfils the requirements of the section unless in addition to stating all the terms of the contract it shows "separately and distinctly" (a) the date of the loan, (b) the principal, and (c) the rate of interest. The evidence is silent on the point and for the sake of argument I am content to assume in the present case that the contract embodied no terms other than those embodied in the charge. But does the charge state separately and distinctly the date of the loan, the principal and the rate of interest?

As has been said, the charge is in the form prescribed by the Land Code. It relates that it is given "in consideration of the sum of $3,500 .....lent to me.....the receipt of which sum I hereby acknowledge." It then goes on to state that the borrower will pay $3,500 to the lender at a certain date and will pay certain amounts by way of interest and he charges the land with such principal and interest in accordance with the provisions of the Land Code.

From this it is quite clear what the principal was. The provisions as to interest are clear. But it is quite impossible to say what was the date of the loan. For all the information that is to be gleaned from the terms of the charge the loan might have been made the same day as the charge was executed. On the other hand it might have been made ten years previously. We know here that in fact the money was lent on the same day as the charge was executed but we know that from the evidence *aliunde*. It is not stated distinctly, or indeed at all, in the instrument itself.

To my mind, apart from anything else this omission to state the date of the loan is fatal to the charge being treated as the note or memorandum required by section 16. I am not saying

that if that date had been stated the charge would have been a sufficient note or memorandum. What I am saying is that it has not been stated and therefore the charge is not a sufficient note or memorandum and that therefore there is no note or memorandum sufficient to comply with the requirements of the Ordinance.

This leads to the conclusion that the charge is unenforceable. On the face of it that conclusion may appear to be somewhat technical. On the other hand, not only do I agree, with respect, with the view of Swift, J., that in this connection the date is of special importance (see *Bennett v. Smith* [2]) but there has been a clear failure to comply with an express provision of the Ordinance. As was said by Lord Radcliffe in the case of *Kasumu v. Baba-Egbe* [3] in relation to the similar provisions of the English Money-lenders Act of 1927 which is clearly *in pari materia* with our own Ordinance:—

"When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

I would therefore allow this appeal with costs and set aside the judgment in the Court below. I am also bound by the decision of this Court in *AR. VR. Palanisamy Servai v. S. V. Lingham* [4] to say that the appellants should have the relief they asked for by way of return of the documents of title and entry of a memorandum of discharge on the land register.

Rigby J.: I have had the advantage of reading the judgment of the President of the Court, with which I agree, and to which I have nothing to add. For the reasons given by him I would allow this appeal with costs, order the return to the appellants of the documents of title and direct that a memorandum of discharge be entered on the Land Register.

Hepworth J.: I agree with my Lord and have nothing to add.

Appeal allowed.

Solicitors: *Hogan, Adams & Allan; R. G. Suppiah.*

THE CHINESE TIN MINES REHABILITATION LOANS BOARD v. CHEE HOI VOON

[O.C.J. (Good J.) February 2, 1959]

[Ipoh — Civil Suit No. 141 of 1954]

Practice and Procedure — Setting aside judgment — Principles on which the Court should act — R.S.C. 1957 O.13 r.10.

There is absolute discretion of the Court to set aside a judgment in default of defence, but the Court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence. Lapse of time is no bar to the application.

Cases referred to:—

(1) *Labouchere v. Tupper* 14 E.R. 670.
(2) *Farhall v. Farhall* 7 Ch. App. 123.
(3) *Ang Chee Seng v. Tan Kee Swee* (1935) M.L.J. 245.
(4) *Evans v. Bartlam* (1937) 2 All E.R. 646.
(5) *Atwood v. Chichester* (1878) 3 Q.B.D. 722.
(6) *Hopton v. Robertson* (1884) W.N. 77.
(7) *Farden v. Richter* (1889) 23 Q.B.D. 124.
(8) *Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon* (1958) M.L.J. 269.
(9) *S. Supramaniam Pillay v. Tan Kah Kiat* (1934) M.L.J. 133.

MOTION.

S. B. Coates for the plaintiffs.

F. C. Arulanandom for the defendant.

Cur. Adv. Vult.

Good J.: This is a motion to set aside the judgment of Buhagiar, J. given on 3rd July, 1954, in this suit; the judgment was for the sum of $28,594.71 with interest and costs, and was a judgment in default of defence.

The defendant, who is the applicant in the present proceedings, was sued as Administrator of the estate of his deceased father, but the judgment was expressed to be given against "the defendant" *simpliciter* and not in his representative capacity. The applicant's ground for making the present application is that the judgment was irregular as it ought to have been a judgment *de bonis testatoris* and not a judgment *de bonis propriis*.

There is abundant authority for the contrary proposition — *Labouchere v. Tupper,* [1] *Farhall*